

**UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION**

**In the Matter of
BACARDI CORPORATION**

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INITIAL DECISION

**Washington, D.C.
February 15, 1990**

**Max O. Regensteiner
Administrative Law Judge**

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APPEARANCES: William E. Morley, John S. Bernas, Michael Hyatte and John L. Krug, for the Division of Corporation Finance of the Commission.

William R. Golden, Jr., Charles L. Marinaccio, Ronald A. Nimkoff and Barbara A. Flynn, of Kelley Drye & Warren, for Bacardi Corporation.

Alan B. Levenson, Richard L. Jacobson and Peter V.B. Unger, of Fulbright & Jaworski, for Daniel F. Bacardi.

BEFORE: Max O. Regensteiner, Administrative Law Judge.

The Proceedings

On May 14, 1987, Bacardi Corporation ("Bacardi") filed a certification, pursuant to Section 12(g)(4) of the Securities Exchange Act of 1934 ("the Act"), for termination of the registration of its common stock under Section 12(g) of the Act. Section 12(g)(4) provides that registration may be terminated where the number of holders of record of a class of security is reduced to less than 300 persons. In the certification, Bacardi represented that as of the certification date, there were less than 200 holders of record of its common stock. However, in a footnote it stated that in determining this figure, it had "not taken into account approximately 240 alleged 'trusts', in substantially similar names, which were recently established for the express purpose of attempting to prevent the deregistration" of the stock. ^{1/} As a result of the insistence of Daniel F. Bacardi ("Daniel"), a shareholder, that those trusts were required to be counted, and that the number of shareholders of record therefore was well in excess of 300, the Commission directed that a hearing be held to determine, in the terms of Section 12(g)(4), whether the certification was "untrue." That Section provides that the Commission shall, after notice and opportunity for hearing, deny

^{1/} Bacardi's argument that the representations in the certification are not part of the record, because the certification was not offered in evidence and no testimony concerning it was adduced, borders on the frivolous. The certification is a part of the record by virtue of Rule 20(a)(1)(iii) or (iv) of the Commission's Rules of Practice (17 CFR 201.20(a)(1)(iii) or (iv)). My comments at the hearing, cited by Bacardi, to the effect that correspondence and files preceding or in existence prior to the Order for Hearing were not part of the record could not reasonably be misconstrued as encompassing the certification, the very subject of the proceeding.

termination of registration if it finds that a certification is untrue. 2/ The Commission's Order for Hearing limited the issues to the following: (1) Whether the trusts were identified as holders on records of security holders maintained by or for Bacardi on May 14, 1987, and, if so, (2) whether the holders of record identified on such records on that date numbered 300 or more. Subsequently, the Commission, by Order of September 18, 1989 ("the September 18 Order"), denied Bacardi's motion to expand the issues. Among other things, it rejected Bacardi's argument that it should be permitted to prove that the trusts were not validly in existence on the certification date, holding that the validity of the trusts was an issue of local law not cognizable in these proceedings.

Hearings were held on the limited issues originally specified. Daniel was granted leave to be heard, with essentially the rights of a party. Post-hearing submissions were made by Bacardi, the Commission's Division of Corporation Finance and Daniel. 3/ The findings and conclusions herein are based on the preponderance of the evidence as determined from the record and upon observation of

2/ Section 12(g)(4) also provides for deferral of termination "pending final determination on the question of denial." In an October 1988 Order, the Commission held that a Notice and Opportunity for Hearing issued in August 1987 had resulted in such deferral. Nevertheless, under Rule 12g-4(b), Bacardi's duty to file reports under Section 13(a) of the Act was suspended when it filed the certification.

3/ Bacardi requested that I hear oral argument. The Division and Daniel opposed the request. The limited issues to be resolved have been exhaustively briefed, and I deem it unlikely that oral argument would further illuminate those issues. The request is therefore denied.

the witnesses. 4/

Factual Background

In April 1987, Bacardi shareholders were advised of a proposal to effect a 1 for 1,000 share reverse stock split, with holders of less than 1,000 shares to receive cash for their shares. A stated purpose of the proposal was to reduce the number of shareholders sufficiently to permit Bacardi to terminate registration of its common stock and thus to relieve it of the costs associated with reporting obligations. The stock split was effected on May 14, 1987, following which the certification was filed. In the interim, however, Bahamian companies apparently allied with Daniel established, or purported to establish, a total of 238 trusts to each of which they transferred 1,000 shares, equivalent to one share on a post-split basis. In its submissions, Bacardi refers to the trusts as the "Supposed Bahamian Trusts." Since the validity of the trusts is not an issue before me, I make no finding regarding the appropriateness of this characterization. For convenience, I refer to them simply as "the trusts."

At the time the certification was filed, The First National Bank of Boston ("Bank of Boston") was principal transfer agent and registrar for Bacardi. Banco de Ponce ("Banco"), a Puerto Rican

4/ Bacardi contends that the burden of proof rests on the Division; Daniel argues that it rests on Bacardi. I do not find it necessary to resolve this question.

bank, was co-transfer agent. 5/ As such, it shared with Bank of Boston responsibility for transferring Bacardi's shares. Bank of Boston maintained the "master securityholder file" (defined in 17 CFR 240.17Ad-9(b) as the official list of individual securityholder accounts) and as such was Bacardi's "recordkeeping transfer agent" (defined in 17 CFR 240.17Ad-9(h) as the registered transfer agent that maintains the master securityholder file). According to Banco "transfer sheets" dated April 21 and 22, 1987, stock certificates in the names of the Bahamian companies were surrendered to Banco and new certificates for 1,000 shares each were issued to the 238 trusts, which were named CA Trust 1-50, MH Trust 1-20, CS Trust 1-36, and SS Trust 1-132, respectively. The transfer sheets were transmitted to Bank of Boston for posting to the master securityholder file. The transfers were never posted to that file, however, apparently because certain information such as the names and addresses of the trustees was not provided. As of May 14 the trusts did not appear as shareholders on the records maintained by Bank of Boston.

Contentions, Discussion and Conclusions

While Bacardi now purports to dispute that the record shows that on May 14, 1987, after the stock split, it had approximately 200 shareholders aside from the trusts, this is a matter beyond

5/ Contrary to Bacardi's position, the record would support a finding that Banco was also co-registrar. However, there is no need to reach this question.

dispute, because Bacardi's certification so represents. 6/ Thus, the only real issue here is whether, on May 14, 1987, the 238 trusts were, in the terms of Section 12(g)(4) of the Act, "holders of record" of Bacardi stock. If that question is answered in the affirmative, it follows that the second issue stated by the Commission -- whether the total number of record holders was 300 or more -- must also be answered in the affirmative.

Rule 12g5-1 under the Act (17 CFR 240.12g5-1) defines the term "held of record." As pertinent here, it provides that securities shall be deemed to be "held of record" by each person who is identified as the owner of such securities on "records of security holders maintained by or on behalf of the issuer." It also provides that securities identified as held of record by a trust, whether or not the trustees are named, shall be included as so held by one person. It is the contention of the Division and Daniel that on May 14 the trusts were identified as shareholders on records of security holders maintained on behalf of Bacardi, i.e., the Banco transfer sheets. 7/ Bacardi disagrees, advancing a number of arguments. Thus, it contends that the transfer sheets are unreliable hearsay, because there is no evidence as to who prepared them or the circumstances under which they were prepared

6/ Moreover, it is confirmed by shareholder lists received in evidence. And Bacardi's counsel acknowledged that the number of record holders was approximately 200. See March 23, 1989 transcript, p. 27.

7/ Concededly, trusts are "persons" for purposes of Section 12(g)(4) and Rule 12g5-1.

and because they are based on hearsay correspondence from the Bahamian companies. 8/ I find this argument to be without merit. The record shows that transfer sheets exactly like the ones at issue were routinely used by Banco in the effectuation of stock transfers, and that, consistent with routine practice and as previously noted, the sheets at issue were transmitted to Bank of Boston for posting to the master securityholder file. Copies of the sheets were produced by both Banco and the Bank of Boston in response to subpoenas for bank records issued by me at the Division's request. Regardless of the reliability of the information on the basis of which transfers were effected, there is no reasonable basis for questioning the reliability of the information on the transfer sheets.

In its Order for Hearing and again in the September 18 Order, the Commission stated that any documentation identifying securityholders that is maintained by or for the issuer constitutes the requisite records under Rule 15g5-1. In the latter Order, the Commission rejected Bacardi's contention that the only relevant record is the master file. Having been rebuffed in this legal argument, Bacardi now contends that as a matter of fact, the only record of its securityholders being maintained on May 14, 1987 was Bank of Boston's master securityholder file, on which the trusts were not identified. It points to testimony of a Bank of Boston official to the effect that while transfers of shares could be made

8/ That correspondence was received in evidence not for the truth of the statements made therein, but simply as documents supplied to and in the possession of Banco or Bank of Boston.

both by Banco and his bank, the latter's master file was "the complete and official records of certificates and owners" of Bacardi stock. (Tr. 260) But this testimony was not focussed on the specific issue presented here and in any event could not be dispositive of the interpretive question before me.

It seems clear to me that the transfer sheets, documents of a type routinely prepared in connection with transfers effected by Banco, were "records of security holders." 9/ Even if, as Bacardi asserts, those records did not conform with the rules relating to the duties of transfer agents, the Commission indicated in the September 18 Order that those rules do not govern the interpretation of Rule 12g5-1, the rule at issue here. It is equally clear that the records were maintained on behalf of Bacardi. The company argues that this is not so because Banco was negligent in effecting transfers when it had not been furnished with the requisite detail concerning the trust and was therefore acting outside the scope of its agency. However, there is no support for the proposition that an agent performing a clearly authorized function negligently is acting outside the scope of its agency. Moreover, consideration of this argument would require an analysis of evidence extrinsic to the transfer sheets, contrary to the Commission's admonition, in the September 18 Order, that such evidence is irrelevant.

9/ Section 3(a)(37) of the Act broadly defines "records" as "accounts, correspondence, memorandums, tapes, discs, papers, books, and other documents or transcribed information of any type. . ."

Bacardi argues that because of the Commission's exclusive jurisdiction to determine the truthfulness of Bacardi's certification, it must decide every issue presented, including the validity of the trusts. As noted, however, this argument is foreclosed, at least before me, by the Commission's earlier determination that the validity of the trusts is not a proper issue in these proceedings. And I find no factual or legal basis for Bacardi's further argument that on or before May 14 it had in fact removed the trusts from its stockholder records because they were non-existent, fictitious persons.

I therefore conclude that on May 14, 1987, there were more than 300 holders of record of Bacardi's common stock; that Bacardi's certification to the contrary was untrue; and that termination of the registration of such stock must therefore be denied. Moreover, Rule 12g-4(b) (17 CFR 240.12g-4(b)) specifies that if a certification is "denied," the issuer must within 60 days file all reports which would have been required had it not filed the certification. 10/

ORDER

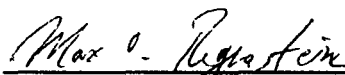
Accordingly, IT IS ORDERED that the termination of registration of its common stock sought by Bacardi Corporation's certification is hereby denied.

FURTHER ORDERED that within 60 days of the effective date of

10/ All proposed findings and conclusions and all contentions have been considered. They are accepted to the extent they are consistent with this decision.

this Order, Bacardi shall file with the Commission all reports which would have been required had the certification not been filed.

This order shall become effective in accordance with and subject to the provisions of Rule 17(f) of the Commission's Rules of Practice. Pursuant to that rule, this initial decision shall become the final decision of the Commission as to each party who has not filed a petition for review pursuant to Rule 17(b) within fifteen days after service of the initial decision upon him, unless the Commission, pursuant to Rule 17(c), determines on its own initiative to review this initial decision as to him. If a party timely files a petition for review, or the Commission takes action to review as to a party, the initial decision shall not become final with respect to that party.



Max O. Regensteiner
Administrative Law Judge

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